

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER: [REDACTED]: [REDACTED]: TL-N-3757-99
[REDACTED]

date:

JUN 7 0 1999

to: Chief, Examination Division

[REDACTED] District

Attn: [REDACTED]

from: District Counsel, [REDACTED]

ject: Large Case Advisory Opinion - [REDACTED]

THIS DOCUMENT INCLUDES CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE SERVICE, INCLUDING THE SUBJECT TAXPAYER. THIS DOCUMENT ALSO CONTAINS TAX RETURN INFORMATION SUBJECT TO THE PROVISIONS OF I.R.C. § 6103 AND ITS USE WITHIN THE SERVICE SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW IT.

We are responding to your memorandum dated May 28, 1999, in which you request legal advice regarding the taxpayer's statute of limitations defense regarding claimed credits under I.R.C. § 4662(e)(2). For the reasons set forth below, the Service may adjust the items in question because the taxpayer and the Service executed a timely Form 872-B, Consent to Extend the Time to Assess Miscellaneous Excise Taxes, extending the statute of limitations for the taxpayer's [REDACTED] excise taxes to [REDACTED]. This memorandum is being simultaneously submitted to the National Office for review under our post ten-day review procedure. Consequently, you should not take any action based on the advice contained herein during the 10-day review period.

Issue

Whether the Service is precluded from adjusting the section 4662(e)(2) credits claimed on the taxpayer's [REDACTED] Forms 720 because the Form 872-B, extending the three-year statute of limitations to [REDACTED] for the taxpayer's excise taxes imposed by section 4661, does not expressly reference such credits.

Facts

[REDACTED] is presently the subject of an examination of its Forms 720, Quarterly Federal Excise Tax Return, for the quarters ended [REDACTED] through [REDACTED]. On [REDACTED] and [REDACTED], the taxpayer and the Service, respectively, executed a Form 872-B, Consent to Extend the

Time to Assess Miscellaneous Excise Taxes, for each period. The form provides that "[t]he amount of liability for Excise tax, imposed on the taxpayer(s) by section 4661...may be assessed at any time on or before [REDACTED]."

On its Forms 720 for the quarters ended [REDACTED] through [REDACTED], the taxpayer reported total taxes under IRS category # 54 at line 3, Part I, relating to chemical taxes per section 4661. Additionally, the taxpayer claimed, also under category # 54, credits for chemicals used in the manufacture of taxable substances which are exported. See Schedule C, Part II, Lines 9 and 10. In Part III of each Form 720, the taxpayer reported total tax at Line 3, adjustments and claims at Line 4, and net tax after claims at Line 5.

Recently, the taxpayer informed the examining agent that the Service is precluded from adjusting its claimed section 4662 credits because the three-year limitations period has expired. According to the taxpayer, the claimed credits are not governed by section 4661 and, therefore, the Form 872-B, which references only that section, is invalid. To support its position, the taxpayer emphasizes that section 4662(e)(2), which provides for credits attributable to taxes paid under section 4661, is not referenced on the Form 872-B.

Relevant Law & Analysis

The three-year statute of limitations on assessment and collection has not expired regarding the credits claimed by the taxpayer on its [REDACTED] Form 720 under I.R.C. § 4662(e)(2).

Section 4661 imposes a tax on any "taxable chemical" sold by the manufacturer, producer, or importer thereof. Except as provided in section 4662(b), a "taxable chemical" is any chemical that is listed in section 4661(b) and that is manufactured in the United States or entered into the United States for consumption, use, or warehousing.

Section 4662(e)(2)¹ allows a credit or refund of tax paid on a chemical under section 4661 if the chemical was (i) exported by any person, or (ii) used as a material in the manufacture of a taxable substance that was exported by any person. The term "taxable substance" is defined in section 4672(a).

¹ All statutory section references are to the Internal Revenue Code in effect during the taxable year at issue.

Section 6501(a) provides that, unless otherwise provided, the amount of tax imposed by the Code shall be assessed within three years after the return was filed. Section 6501(b)(4) provides that the three-year limitations period on excise taxes will begin to run with respect to a particular tax imposed under subtitle D (sections 4001 through 5000) when an excise tax return is filed which has an entry for that tax.

Section 6501(c)(4) provides that before the expiration of the time prescribed for the assessment of any tax, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time before the expiration of the period agreed upon. IRM 4727(9) provides that "if an extension is desired for more than one type of tax reported on the same Form 720, each type of tax and its corresponding code section should be listed separately on the consent form." The form does not contain any language relating to extensions relating to credits or refunds.

In Badaracco v. Commissioner, 464 U.S. 386 (1984), the Supreme Court concluded that a nonfraudulent amended return does not commence the statute of limitations under section 6501 where the taxpayer had previously filed a fraudulent return. In reaching that conclusion, the Court stated that "limitations statutes barring the collection of taxes otherwise due and unpaid are strictly construed in favor of the Government. Id. at 392; Bufferd v. Commissioner, 506 U.S. 523, 527 n.6 (1993).

In this case, the taxpayer and the Service validly extended the limitations period for the taxpayer's [REDACTED] excise taxes by timely executing a Form 872-B for that year. In that form, the parties agreed that "[t]he amount of liability for excise tax, imposed on the taxpayer(s) by section 4661...may be assessed at any time on or before [REDACTED]."

Contrary to the position inherent in the taxpayer's statute of limitations defense, the Service will not assess, per se, the amount of any disallowed section 4662(e) claims reported on line 13, Part III of the taxpayer's Forms 720. Rather, the Service is examining, and will adjust if necessary, the taxpayer's excise tax liability, imposed under section 4661, for the periods [REDACTED] through [REDACTED]. Any deficiency determined by the Service in this case will be a deficiency in excise taxes based on the a finding of unreported excise taxes, the disallowance of claimed credits, or both. Consequently, the Form 872-B, which

unambiguously extends the statute of limitations for excise taxes under section 4661, is valid. Had the taxpayer desired to extend the limitations period for assessments relating to certain adjustments, it could have included such conditional language in the consent.

The fact that an assessment of additional excise taxes imposed under section 4661 may arise solely from adjustments to the claimed credits is of no consequence for statute of limitations purposes. The section 4662 credits are not "taxes" within the meaning of sections 6501(a) and 6401(c)(4), but merely one item upon which the taxpayer computed its excise taxes reflected on its Forms 720. Additionally, section 6501(c)(4) expressly authorizes taxpayers and the Secretary to extend the limitations period for the assessment of "tax" rather than expenses or credits. Had the taxpayer desired to extend the limitations period for assessments relating to certain adjustments, it could have entered into a restricted consent. See, e.g., Bufferd.

Finally, carried to its logical extreme, the taxpayer's argument necessarily implies that a Form 872 or Form 872-A relating to income tax does not validly extend the assessment period for a deficiency based on disallowed Earned Income Credits if section 32 is not expressly included in the consents. There is no support for either position in the case law. In the absence of such contrary authority, any alleged ambiguity in the law should be construed in favor of the government. Badarocco, 464 U.S. at 392.

Please call [REDACTED] of this office at [REDACTED] if you have any questions regarding this matter.

[REDACTED]
District Counsel

By:

[REDACTED]
Attorney